of CLEC access to the Verizon white page directory. Issues were also raised in the technical conferences on March 1, 5, 6, and 21, 2001, the hearings before the Commission on April 25-27, 2001, and in the initial and final Comments by the following parties: the Pa. OCA, the Pa. Office of Small Business Advocate ("Pa. OSBA"), the Pa. Office of Trial Staff ("Pa. OTS"), XO, CTSI, and AT&T Communications of Pennsylvania, Inc. ("AT&T").

At the Pa. PUC technical conferences, Renie Spriggs, Director of Wholesale Quality Assurance for Verizon, offered testimony concerning white page listings.[30] Her duties entail reviewing all the "metrics that are reported across the region to various jurisdictions."[31] According to Verizon, LSRs (Local Service Requests) are processed by Verizon and should result in listings in the Verizon white page directory. Ms. Spriggs stated concerning directory listings that "a little less than half of our LSRs, flow through to completion without intervention of human hands."[32] The LSRs that flow through are primarily those that originate from UNE-Platform or resale carriers. Id. at Tr. 12 to 13. The LSRs originating with facilities-based carriers do not flow through. According to Verizon,

> if the LSR is coming through the gateway and it does comply with the flow-through category, it actually goes to our service order generator, and in the case of Pennsylvania, through SOP/DOE and out to our service order access system where a confirmation

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30 Pa. PUC Mar. 1, 2001 Tech. Conf., Tr. 8- 9 (attached as Appendix I).

31 Id. at Tr. 9.

32 Id. at Tr. 11.

> is returned to our customer. If the order does not comply with the flow-through category, it is then dropped to the TISOC, the operations center, where the service order is processed by the service representative.[33]

The fact that so many CLEC orders from these categories of carriers do not flow through raises great concern. Where the orders do not "flow through" they must be hand processed and this creates additional difficulties and concerns. Verizon has not yet implemented any changes such that more directory listing requests would better flow through its system. The Pa. OCA does not contend that failing to flow through a directory request is a itself violation of Checklist Item Number 8. However, it has become very clear that where many CLEC requests must be typed into the system by manual intervention, but the Verizon retail requests flow through, such a system will likely result in poorer performance for CLECs than for Verizon. The record below clearly demonstrates that this distinction as to how CLEC and Verizon customers have their directory requests processed results in poorer performance for CLEC directory listings than for Verizon customers.

The Pa. OCA has been particularly concerned with those white page listing requests that do not flow through electronically and where a Verizon employee is required to manually retype the listing information. Accordingly, the Pa. OCA has proposed that all CLECs should be able to preserve the existing listings of their customers, as previously included in the Verizon white pages.[34]

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[33] Id. at Tr. 11 to 12.

[34] Pa. OCA Initial Comments at 21-23.

The problems testified to by XO and CTSI, specifically, demonstrate that CLECs have suffered from poorer access to the directory than do Verizon's own customers. Numerous errors have occurred for the three CLECs who raised white pages issues in their Comments to the Pa. PUC: XO, CTSI, and AT&T. Because of the large amount of errors encountered by these CLECs, the Pa. OCA continues to believe that all carriers should have the option of simply retaining the directory listing that the customer had before switching to the CLEC.

The Pa. OCA submits that the primary source of directory listing errors has involved facilities-based carriers. For customers of facilities-based carriers, the Verizon system deleted the preexisting directory listing for that customer requiring Verizon to reenter the customer listing into the database. [35] As noted above, essentially whenever a Verizon customer switches to a CLEC that is a facilities-based carrier, the end user is disconnected from the Verizon white pages system. The CLEC must then submit an LSR or a subsequent DSR (Directory Service Request) for the directory listing. A DSR is also submitted if a correction is necessary. [36] XO testified that an LSR is an order that would initiate service with XO Communications. [37] According to XO, a DSR involves a "stand alone" directory listing. [38] XO stated that the initial directory listing request

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35 Pa. PUC Verizon Checklist Declaration at 134 (attached as Appendix J).

36 Pa. PUC Mar. 21, 2001 Tech. Conf., Tr. 82 (attached as Appendix K).

37 Id. at Tr. 161.

38 Id. at Tr. 161.

is made in the LSR and corrections or changes to the directory listing are then done to the DSR at a later time. [39]

The CLEC may also elect to "check the box" of the ERL (End User Retained Listing.) This is for all intents and purposes an "as is" request to maintain the directory listing "as is" when the end user was a Verizon retail customer. For Resale and UNE-P CLECs, this "as is" ERL effectively retains the listing, and the order is flowed through without any manual intervention. However, for facilities-based carriers, this listing request must be manually retyped into the system even where the facilities based CLEC has requested that the listing should remain in place undisturbed. This is where many errors occur, *i.e.* the manual retyping of the name, address, and phone number(s) of the directory listing leads to errors. The Pa. OCA submits that Verizon has never justified this discriminatory practice against facilities based carriers.

The Pa. PUC states that Verizon will modify its SOP/DOE ("Service Order Processor/Directory Order Entry") system to allow the Telecom Industry Services Operations Center ("TISOC") employees processing "a loop LNP" or "LNP-only," where the end-user's listing(s) is to remain "as is," to automatically generate a service order that will contain the customer's directory listing information from the customer service record." Pa. PUC Consultative Report at 194. The Pa PUC further states that Verizon has committed to implement "business scenarios" in order to avoid inadvertent omissions of directory listings. Id. at 195. To date,

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[39] Id. at Tr. 162.

however, no agreement has been reached and Verizon has implemented no changes in order to correct these problems. The Pa. OCA submits that the implementation plan to develop system changes has not even been completed. Accordingly, the status quo still exists and will exist until a new system process is developed. There is no definitive way to determine whether the proposal being developed will work in the way that Verizon states it will or that the problems that have existed to date will be reduced by these changes.

Verizon has recognized that system problems have occurred and stated that it supplied directory addenda to consumers in Harrisburg, Williamsport, Lock Haven, and Pittsburgh in order to attempt to cure white page errors.[40] Corrections via an addenda, however, are not the norm according to Verizon's witness, Helen Falcone. She stated that "we normally wait until the next year to correct the listing" when asked whether it was the policy to issue an addenda before the next edition of the white page directory was published.[41] Verizon additionally stated that it attempts to correct the customers' listed information in the Directory Assistance database in order to correct for next year's directory listing.[42] In either case, however, harm has already been created by the time the addenda are published or a correction is made because an erroneous name

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40 See Pa. OCA Final Comments at Appendix A, OSBA Interrogatory to Verizon, No. I-5.

41 Pa. PUC March 1, 2001 Tech. Conf., Tr. 256.

42 See Pa. OCA Final Comments at Appendix A, OSBA Interrogatory to Verizon, No. I-15.

and number has been circulated to the public. In the case of omitted listings, the time period between the publication of an addenda and the directory listing is still a period in which the consumer has been harmed. While an addendum would help to resolve the situation, it does not go to the core problem, and the reoccurrence in future years.

It has also been demonstrated that the CLEC error rates are significantly higher than the error rate that Verizon has found for its own retail customers. CTSI raised similar complaints in its Comments before the Pa. PUC.[43] In CTSI's Pa. PUC Comments, CTSI identified 205 errors in Listing Verification Reports ("LVR") for the Lancaster directory.[44] CTSI claimed that CTSI advised Verizon of the errors and claims that 87, or 42.4% of the errors identified were not corrected in the Verizon publication.[45] Further, in testimony, CTSI claimed that 1,004 errors were identified on the LVRs for the Wyoming Valley.[46] Approximately, 188 of those errors were not subsequently corrected in the directory according to CTSI.[47] Whether Verizon or the CLEC erred initially, when the errors have been identified on the LVRs and those errors are not subsequently corrected, this results in a disturbing pattern of errors in the Verizon white page

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43 CTSI Comments to the Pa. PUC at 6 (attached as Appendix L).

44 Id.

45 Id.

46 Pa. PUC Mar. 21, 2001 Tech. Conf., Tr. 153.

47 Id. at Tr. 154.

directory listings. The consumers are ultimately harmed by this process because their names and their businesses are either erroneous or completely omitted from the directories.

The number and percentage of errors for Verizon retail customers, as compared to CLEC customers, is much lower and effectively demonstrates the results of the discriminatory process used by Verizon for CLECs in the processing and publication of white pages directory listings. In response to CTSI Interrogatory No. 30 in the proceeding below, Verizon stated that for 2000, Verizon had 1,156 consumer reported directory listing errors out of approximately 4.9 million listings, or approximately an error rate of 0.02%.[48]

This compares to the unfavorable experiences of the CLECs, XO and CTSI. Ms. Denise Woods, directory provisioner from XO, testified that in the Philadelphia LVR Report there were 1,632 listings and 26 errors, which results in an error rate of 1.59%. [49] In the Allentown/Bethlehem directory, XO found 2,105 listings and 83 of these had errors, which results in an error rate of 3.9%.[50] The third directory had 1,037 XO listings with 42 errors, which represents an error rate of 4.05%. The testimony presented by XO included only errors involving ERLs. [51]

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[48] See Pa. OCA Final Comments at Appendix A, CTSI Interrogatory to Verizon, No. I-30; see also Pa. PUC March 1, 2001 Tech. Conf., Tr. 213 to 214.

[49] Id. at Tr. 180.

[50] Id. at Tr. 181.

[51] Id. at Tr. 179.

CTSI raised similar complaints in its Comments. [52] In CTSI's Comments, they identified 205 errors in LVRs for the Lancaster directory. [53] According to CTSI, CTSI advised Verizon of the errors and claims that 87, or 42.4%, of the errors identified were not corrected in the Verizon publication. [54] Further, in testimony, CTSI claimed that 1,004 errors were identified on the LVRs for the Wyoming Valley. [55] Approximately, 188 of those errors were not subsequently corrected in the directory according to CTSI. [56]

The CLEC error rates are significantly higher than the error rate that Verizon has found for its own retail customers. Whether Verizon or the CLEC erred initially, when the errors have been identified on the Listing Verification Reports and those errors are not subsequently corrected, this results in a disturbing pattern of errors in the Verizon white page directory listings. The consumers are ultimately harmed by this process because their names and their businesses are either erroneous or completely omitted from the directories.

3. Pa. PUC Consultative Report

The Pa. PUC Consultative Report discusses Checklist Item Number 8. [57] While

[52] CTSI Comments to the Pa. PUC at 6.

[53] Id.

[54] Pa. PUC Mar. 21, 2001 Tech. Conf., Tr. 153.

[55] Id.

[56] Id. at Tr. 154.

[57] Pa. PUC Consultative Report at 190-209.

the Pa. PUC does not believe that the problems rise to the level of noncompliance, the Pa. PUC does recognize that there are problems with Verizon's directory listings process and states that the "CLECs in this proceeding did demonstrate the manual nature of much of the process heightens the chance of errors."[58] The Commission further states that "we would like to see, but do not presently require, system changes to allow all directory listing orders to flow through thereby mitigating manual intervention and thereby for errors."[59] In part, the Commission utilizes Verizon's efforts to rectify the directory listings problems as a basis for granting 271 approval. The Pa. OCA submits that Verizon's efforts at correcting its directory listings problems are appreciated. However, such corrections must be made before Verizon can be certified to have met Section 271 compliance.

The Pa. OCA further submits that there is no way of determining whether the problems that have existed to date will be reduced by these changes. In any event, none of these changes have yet taken place. Checklist Item Number 8 is clear that CLECs must have access to "(w)hite pages directory listings for customers of the other carrier's telephone exchange service."[60] The Pa. OCA submits that Checklist Item 8 does not state that Verizon must attempt to provide equal access in the future, but that Verizon must be found to have already met the

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[58] Id. at 208.

[59] Id. at 208-209.

[60] 47 U.S.C. § 271(c)(2)(B)(viii).

requirements of this Checklist Item. Pa. PUC Commissioner Fitzpatrick stated in his Concurrence in Part and Dissent in Part that "(t)he Telecommunications Act plainly requires Verizon to satisfy the fourteen-point checklist before it enters the long-distance market." [61]

4. Metrics Related To White Pages

The Pa. OCA submits that a metric also needs to be developed relating to the accuracy of directory listings. The current metrics relating to directory listings: OR-6, Order Accuracy; PO-2, OSS Interface Availability; GE-1, Directory Listing Verification Reports.[62] None of these metrics measure the accuracy of the directory listings as published. The Pa. PUC stated in its Consultative Report that the record suggests that there is merit to the development of a directory listing accuracy metric, but did not require it as a pre-condition for meeting Checklist Item Number 8.[63] None of these metrics measure the accuracy of the directory listings as published. Metric GE-1 is the only specific metric involving a directory listing. GE-1 states that:

> This metric measures the percentage of directory listing verification reports transmitted on or before the due date. For the purposes of this metric, the due date for a directory listing verification report will be deemed to be the date 30 business days prior to the close out date for the directory. The process for obtaining listing verification reports is documented in BA's CLEC

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[61] Pa. PUC Consultative Report, Appendix A, dissenting statement of Pa. PUC Commissioner Terrance J. Fitzpatrick at 1 (emphasis in original).

[62] Pennsylvania Carrier-to-Carrier Guidelines Performance Standards Reports (Jan. 15, 2001) (Jan. 2001 C2C Report) (attached as Appendix M).

[63] Pa. PUC Consultative Report at 209.

and Reseller Handbooks.[64]

Ms. Falcone testified for Verizon that "(t)he GE-1 metric is a metric that reports out whether the listing verification report is sent out on time."[65] This metric only reports whether the LVR has gone out by a certain date, which is 30 business days prior to the "close out" date on the directory.[66]

The Local Service Request Order Accuracy metric is listed at OR-6. Metric OR-6 states that:

> Order accuracy is defined as the percentage of orders completed as ordered by the CLEC. Two dimensions will be measured. The first is a measure of orders without BA (now Verizon) errors (Metric OR-6-01). The second is focused on the percentage of fields that are populated correctly.[67]

Specifically, the Order Accuracy metric measures the accuracy of the Local Service Request or LSR. The LSR contains such information as the billed number, the PON number, telephone number, ported number (if applicable), Circuit ID, RSID or AECN, E911 Listing Information, Features (i.e. for Resale, UNE-P, and Switching Orders); Application Date; Due Date; Remarks; and *(if included)* Directory Listing Information. Metric OR-6-01 requires that 95% of LSR

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64 Jan. 2001 C2C Report, Metric GE-1.

65 Pa. PUC Mar. 1, 2001 Tech. Conf., Tr. 111.

66 Jan. 2001 C2C Report, Metric GE-1; Pa. PUC Mar. 1, 2001 Tech. Conf., Tr. 112.

67 Jan. 2001 C2C Report, Metric OR-6.

orders to Verizon be without errors.[68] However, this does not accurately measure the directory listing errors because the directory listing information would have to be submitted in the LSR. It also does not measure what this becomes in the published directory.

There is a metric that measures the accuracy of the Directory Assistance update database, OD-3.[69] The Directory Assistance metric is defined as:

> For Directory Assistance updates completed during the reporting period, the update order that the CLEC sent to BA is compared to the Directory Assistance database following the completion of the update by BA. An update is "completed without error" if the Directory Assistance database accurately reflects the new listing, listing deletion or listing modification, by CLEC.[70]

This metric, while important, still does not measure the accuracy of the published directory listings for CLECs as compared to those for Verizon.

No white page directory accuracy metric exists that compares the actual white page listing as published with the CLEC request. Also, no directory listing metric exists that measures the accuracy in the initial LSR or DSR and compares it to the percentage of errors in the published directory listings for CLEC customers versus Verizon retail customers.

Verizon does not presently track accuracy of the white pages in the form of a metric. Verizon responded to a Pa. OCA in the proceeding below which asked if Verizon tracked

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68 Id.

69 Jan. 2001 C2C Report, Metric OD-3.

70 Id.

the data on listings which were omitted or "dropped" from the Verizon white pages. Verizon responded that the Company "does not track this data." [71] Also, Verizon stated in response to Pa. OCA Set III, Interrogatory No. 6 that the number and percentage of listings omitted from white pages listings are not tracked by Verizon.[72] Further, Verizon stated in response to Pa. OCA Interrogatory Set III, No. 9 about an investigation being done as to the cause of loss of listings that:

> In the course of correcting individual listings omissions, the cause of the omission may be discovered. In addition, the cause of listings will be investigated if the reported number of listings omissions indicates a process or system problem.[73]

The Pa. OCA submits that this process is not sufficient to track the scope of the errors that may occur in directory listings. The Pa. OCA submits that this data must be tracked and submitted to the Pa. PUC through a separate metric. The extent of the problem must be tracked so that it can be rectified. The metric should also be subject to penalties for lack of compliance. Although the Pa. PUC has commenced a proceeding, Re: Performance Measures Remedies at

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[71] See Pa. OCA Final Comments at Appendix A, Pa. OCA Interrogatory to Verizon, No. III-7; CTSI Interrogatory to Verizon, No. I-30.

[72] See Pa. OCA Final Comments at Appendix A, Pa. OCA Interrogatory to Verizon, No. III-6.

[73] See Pa. OCA Final Comments at Appendix A, Pa. OCA Interrogatory to Verizon, No. III- 9.

Docket No. M-00011468, in part, to deal with the issue of metric development, there are not yet any measures in place to track directory listing accuracy.[74]

5. Conclusion

Verizon should not be granted Section 271 approval until conditions are established that will improve the quality of the white pages directory listing process for CLEC customers, and metrics are in place to measure the level of accuracy for white pages.

C. Verizon Pa. Must Assure That It Will Allow The Pa. PUC To Apply A Performance Assurance Plan So That Verizon's Local Market Will Be "Irreversibly" Open to Competition Under the Public Interest Standard.

1. Introduction

In the Pa. OCA Initial and Final Comments to the Pa. PUC, the Pa. OCA opposed the issuance of a favorable consultative report, so long as Verizon's appeal of the Pa. PUC's authority to require Verizon to make payments to CLECs in the event of Verizon's failure

[74] Re: Performance Measures Remedies, Pa. PUC Docket No. M-00011468 (2001). The proceeding was initiated from ordering paragraph 16 in Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Pa. PUC Docket No. M-00001353 and was modified by the June 6, 2001 Pa. PUC Secretarial Letter in Re: Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC Authorization to Provide In-Region InterLATA Service in Pennsylvania, Pa. PUC Docket. No. M-000001435 (2001). Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations, Pa. PUC Docket No. M-00001353; Re: Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC Authorization to Provide In-Region InterLATA Service in Pennsylvania, Pa. PUC Docket. No. M-000001435 (2001).

to meet performance standards was pending.[75] In particular, Verizon had appealed the Pa. PUC's imposition of what have been referred to as "Tier II" or self-effectuating remedies, whereby Verizon pays competitors for missed performance metrics.[76] As the Pa. OCA explained to the Pa. PUC, so long as Verizon's challenge of the Pa. PUC's authority was outstanding there could be no confidence that the local markets are now and would continue to be irreversibly open after Verizon's entry into the long distance market.[77]

The FCC has explained that one important factor that it will consider as a part of the public interest standard is whether "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." [78] The FCC has ruled that the Department of Justice standard of review as to "whether the local market is fully and *irreversibly* open" also is related to the public interest requirement. [79]

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[75] The Pa. PUC issued an opinion and order on December 31, 1999 which imposed a Performance Assurance Plans (PAP) on Verizon. Pa. PUC Performance Metrics Order at 11-12. Verizon filed an appeal of that Pa. PUC order with the Commonwealth Court of Pennsylvania at Docket 1902 C.D. 2000. Pa. OCA Initial Comments at 7.

[76] The Verizon Tier II PAP remedies appear roughly equivalent to the Tier-1 remedies under the SWBT Kansas and Oklahoma PAPs, that the FCC described as penalties which "apply generally to customer-affecting measurements" and "are paid to competitive LECs receiving the substandard performance...." Kansas and Oklahoma 271 Order at ¶ 271. In other words, this type of performance assurance remedy is not unique to Pennsylvania.

[77] Pa. OCA Initial Comments at 5-13, 15-17.

[78] New York 271 Order at ¶ 429.

[79] Id. at ¶ 429 (emphasis original).

Approval of Verizon's 271 application would only be in the public interest so long as there is assurance that the local market will remain open after approval.[80] The FCC has repeatedly recognized the importance of state performance monitoring and enforcement mechanisms as "probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest."[81]

The Pa. PUC entered an order intended to create metrics and self-effectuating remedies for inadequate performance sufficient as to both form and amount to prevent competitive backsliding by Verizon.[82] The Pa. PUC made clear its intent that "these performance measures, standards and remedies shall be effective ... and shall continue beyond the filing and resolution of any section 271 proceeding commenced..." by Verizon. [83]

In Comments to the Pa. PUC in the proceeding below, Verizon opined that the Performance Assurance Plan ("PAP") imposed by the Pa. PUC Performance Metrics Order "meets the FCC's criteria in every respect." [84] Yet, at the same time, Verizon had appealed the

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80 Massachusetts 271 Order at. ¶ 233.

81 Kansas and Oklahoma 271 Order at ¶ 269; *see also* New York 271 Order at ¶ 429.

82 Pa. PUC Performance Metrics Order at 11-12

83 Id. at 161.

84 Verizon Comments at 86, Consultative Report on Application of Verizon Pennsylvania, Inc., for FCC Authorization to Provide In-Region, InterLATA Service in Pennsylvania, Pa. PUC Docket No. M-00001435 (Apr. 18, 2001) (attached as Appendix N).

Pa. PUC Performance Metric Order, alleging that the Pa. PUC lacks the basic authority under federal or state law to impose the self-effectuating, Tier II remedies which are part of the PAP.[85]

As explained below, the Pa. OCA submits that Verizon's position that it may challenge the Pa. PUC's basic authority to implement and modify the PAP undermines any finding that approval of Verizon's 271 application is in the public interest.

2. Verizon Has Asserted That It May Still Challenge The Pa. PUC's Authority To Impose The Tier II, Self-Effectuating Remedies As Part Of A Performance Assurance Plan In The Future.

Verizon's statements made during hearings before the Pa. PUC made clear that Verizon wants a favorable consultative report and FCC approval of its 271 application, while reserving its right to challenge the PUC's basic authority to continue to monitor and enforce Verizon's performance through a PAP.

Specifically, during the technical conferences before the Pa. PUC, Verizon made clear that it could make concessions in the short term, including the possible withdrawal of its appeal of the Pa. PUC Performance Metrics Order, but that Verizon reserved its right to challenge the Pa. PUC's authority on this issue. Pa. PUC Law Bureau counsel Maryanne R. Martin specifically asked Verizon counsel to clarify Verizon's position, to which Julia Conover, Verizon

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[85] Verizon Pennsylvania, Inc. v. Pa. PUC, "Verizon Docketing Statement Case Summary, Statement of Issues and Description of Previous Settlement Attempts" at 2, filed August 31, 2000, Pa. Cmwlth Ct. Docket 1902 C.D. at 2000 (attached as Appendix O). The Pa. PUC had identified the multiple sources of its legal authority to issue the Performance Metrics Order and require Verizon to pay the specific remedies imposed at pages 9 to 13 of that Order.

counsel replied as follows:

> Ms. Martin ... Does that mean that Verizon's consent to a post-271 performance assurance plan, including the penalties, means that the PUC can modify the plan after any Verizon Pennsylvania application for 271 authority is granted?
>
> Ms. Conover I think what I would say is the metrics clearly have unilateral power to modify. We believe, however, that we would agree to a reasonable modification on the liquidated damages side, but we cannot agree and *I would think we would reserve the right ultimately to challenge the underlying Commission's ability to impose a liquidated damage remedy.*
>
> ....
>
> I don't want to say that there is an open-ended agreement, but we would agree and we've said we would agree to a reasonable penalties post-271.[86]

In reply to further clarifying questions from Pa. PUC staff, Verizon counsel Conover stated

> Ms. Conover I guess that I would have to say is that our legal position is that the Commission does not have the statutory authority to impose liquidated damages. If we withdrew our appeal today, that would still be our legal position, and I don't think that there is any reason – *if we withdrew our appeal today and later you were to impose greater penalties and we wanted to take an appeal, I think this issue would still be open to us to appeal.*[87]

Thus, Verizon made clear that it considers the Pa. PUC's basic authority to impose Tier II

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[86] Pa. PUC March 15, 2001 Tech. Conf., Tr. 125 (emphasis added) (attached as Appendix P).

[87] Id. at 126 (emphasis added).

remedies as subject to challenge in the future, at any time the Pa. PUC may decide that modification of these remedies are necessary and proper.

After the hearing phase of Verizon's proceeding before the Pa. PUC, the Pa. PUC issued a letter on June 6, 2001 to Verizon stating that the Pa. PUC cannot find that the Pennsylvania markets are fully open to competition "absent withdrawal of Verizon's pending appeal challenging the Commission's legal authority to impose remedies..." as part of the Verizon PAP.[88] As noted in the Pa. PUC Consultative Report, Verizon withdrew that specific appeal on June 7, 2001.[89]

3. The FCC Cannot Grant Verizon's 271 Application Unless Verizon Is Prohibited From Undermining The Pa. PUC's Monitoring And Enforcement Efforts.

The Pa. OCA is concerned that Verizon's withdrawal of its most recent appeal addresses only part of the problem. Specifically, after 271 approval is granted, there will be nothing to prevent Verizon from reviving its argument in the future that the Pa. PUC lacks the basic authority to impose remedies of the type already imposed under the existing PAP. As the Pa. PUC noted, market conditions and commercial experience may warrant future changes in the PAP.[90] The Pa. OCA is concerned that Verizon may at that time challenge the Pa. PUC's underlying

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88 Pa. Consultative Report, Appendix I - "Pa. PUC June 6, 2001 Secretarial Letter to Verizon" at 2.

89 Pa. PUC Consultative Report at 262; see Appendix I to the Pa Consultative Report.

90 Pa. PUC Consultative Report at 264.

authority to impose any or all significant parts of the PAP. The Pa. OCA submits that Verizon's withdrawal of its appeal of the Pa. PUC Performance Metric Order did not end Verizon's ability to challenge the Pa. PUC's very same authority in the future. This casts doubt on whether approval of Verizon's 271 application can truly be in the public interest at the present time.[91]

The Pa. PUC clearly shares the Pa. OCA's concern. After summarizing the details of Verizon's June 7, 2001 commitments including withdrawal of Verizon's appeal and voluntary implementation of increased self-effectuating remedies under Tier II of the PAP, the Pa PUC stated

> we expressly rely upon (a) the increased self executing remedies under Tier II, (b) the enhanced self-executing remedies for electronic billing metrics, and (c) Verizon PA's withdrawal of its pending appeal at No. 1902 C.D. 2000 challenging the Commission's statutory authority to impose self-executing remedies for our conclusion and recommendation to the FCC that the Pennsylvania PAP is adequate and permanent for section 271 purposes.[92]

Nonetheless, the Pa. PUC admonished Verizon that having "unconditionally accepted these terms for our positive recommendation to the FCC, we do not expect Verizon to seek to undo these terms in any subsequent litigation or proceeding." Id.

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[91] See Pa. PUC March 15, 2001 Tech. Conf., Tr. 125, 126 (statements of Verizon counsel).

[92] Pa. PUC Consultative Report at 268.

However, the Pa. OCA is concerned that the Pa. PUC's admonishment is not sufficient to assure that the local markets are and will be irreversibly open to competition. As the Pa. OCA explained to the Pa. PUC, Verizon's pursuit of its appeal, in and of itself, likely had a chilling effect on competition through the creation of uncertainty as to the continuity of the PAP.[93] The Tier II remedies are an integral part of the Pa. PUC's plan to provide Verizon with an incentive to perform and provide access to competitors in a non-discriminatory manner.[94] Verizon's declaration of its right to challenge in the future the Pa. PUC's fundamental authority to impose Tier II remedies under the PAP is also likely to have a chilling effect, even if not exercised. The FCC should not find that approval of Verizon's application is in the public interest until this uncertainty has been eliminated.

Clearly, Verizon has not agreed to forego challenges to the Pa. PUC's authority to impose the Tier II type of remedies which are an integral part of the PAP. Yet Verizon asks the FCC in its 271 Application to accept the existence of the state imposed PAP as evidence that the local markets are open and will remain open. The Pa. OCA submits that approval of Verizon's 271 application cannot be in the public interest so long as Verizon has reserved the right to seek to dismantle the very PAP terms that the Pa. PUC found supportive of Verizon's application and that Verizon also relies upon in its 271 Application.

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93 Pa. OCA Initial Comments at 10-11.

94 Pa. PUC Performance Metrics Order at 1, 158-61.

The Pa. OCA therefore urges the FCC to find that approval of Verizon's 271 application is not in the public interest unless or until Verizon commits to not challenge through litigation or other means the Pa. PUC's fundamental underlying authority to impose remedies of the type already incorporated in the Verizon PAP.[95]

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[95] Verizon should be required to explicitly commit to not challenge through an appeal the Pa. PUC's fundamental authority to impose and modify the PAP, including the possible increase of Tier II remedies. Such a commitment would not bar Verizon from appealing a Pa. PUC order as an abuse of discretion or without support of substantial evidence, but would prevent Verizon from challenging the legality of the Commission's authority to impose remedies of the type already in place.

IV. CONCLUSION

WHEREFORE, the Pennsylvania Office of Consumer Advocate respectfully submits that the Federal Communications Commission should not approve the request of Verizon to received Section 271 authority to offer interLATA service until Verizon shall address the problems set forth above.

Respectfully submitted,

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Dated: July 11, 2001
*64604

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Application by Verizon Pennsylvania, Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Pennsylvania	:	CC Docket No. 01-138

I hereby certify that I have this day served a true copy of the foregoing document, Comments of the Office of Consumer Advocate to the Second Further Notice of Proposed Rulemaking, upon parties of record in this proceeding. Dated this 11th day of July, 2001.

Respectfully submitted,

Barrett Sheridan

Philip F. McClelland
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